UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE:	)	
	)	
DIANNA LYNN LYVERS	)	Case No. 94-33017(3)7
KIMBERLY HASTINGS	)	94-33018(3)7
JAMES R. REYNOLDS	)	94-33199(3)7
CHARLES RAY & TINA M. BLAKEMAN	)	94-33621(3)7
	)	
	)	
	)	
Debtors.	)	

ORDER

Pursuant to the Court's Memorandum entered this same date and incorporated herein by reference, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that R.L. McCubbins refund $195 to Charles and Tina Blakeman;

IT IS FURTHER ORDERED that R.L. McCubbins pay $500, one-half to Mr. Reynolds and one-half to the Clerk of Court, as sanctions pursuant to 11 U.S.C. § 110;

IT IS FURTHER ORDERED that the Motion to Dismiss the Reynolds case, No. 94-33199(3)7, be and hereby is, OVERRULED;

IT IS FINALLY ORDERED that R.L. McCubbins be and hereby is ENJOINED from preparing for filing or filing any petitions, motions, pleadings and other papers in the Bankruptcy Court for the Western District of Kentucky from the date of entry of this

Order and the Clerk of this Court is directed to refuse to accept any petition or pleading prepared by R.L. McCubbins.

March _____, 1995

DAVID T. STOSBERG
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

IN RE:	)	
	)	
DIANNA LYNN LYVERS	)	Case No. 94-33017(3)7
KIMBERLY HASTINGS	)	94-33018(3)7
JAMES R. REYNOLDS	)	94-33199(3)7
CHARLES RAY & TINA M. BLAKEMAN	)	94-33621(3)7
	)	
	)	
	)	
Debtors.	)	

MEMORANDUM

The Court is faced today with a most disturbing issue - whether to enjoin R. L. McCubbins (hereinafter referred to as "McCubbins"), a bankruptcy petition preparer, from filing papers in this Court. McCubbins has prepared bankruptcy petitions for debtors in various cases in this District. However, the Court elects to focus on four pending cases: Hastings (case no. 94-33018); Lyvers (case no. 94-33017); Reynolds (case no. 94-33199); and Blakeman (case no. 94-33621). In each of these bankruptcy cases, McCubbins has prepared the petition for the debtors, who have filed their bankruptcies pro se.

The Court's grave concern with this matter is interference with the proper administration of the debtor's case. Every honest, but unfortunate, debtor is entitled to a fresh start via a discharge, without improper interference with the administration of the bankruptcy case. This sacred process has gone awry in the above cases and others prepared by McCubbins.

McCubbins holds himself out as a "typist" of bankruptcy petitions. However, McCubbins' conduct surpasses that of a mere typist and includes activities such as preparing and filing pleadings on behalf of debtors. The Court is most disturbed by McCubbins' signing and filing a Motion to Dismiss in the Reynolds bankruptcy case. (See Motion attached hereto as Exhibit "A"). The Court conducted a hearing on this Motion on January 30, 1995. Mr. Reynolds appeared and clearly indicated that he did not want his bankruptcy case dismissed because he desperately needed a discharge. (See Transcript of Hearing dated January 30, 1995, p. 3-5). Mr. Reynolds stated that he could not afford for his creditors to garnish his wages as they had done prior to the filing of his petition. Id. Based on Mr. Reynolds' statements, we will enter an Order procedurally overruling McCubbins' Motion to Dismiss the Reynolds case.

In the Hastings case, the debtor sought to pay her filing fee in installments. The Court entered its form Order allowing her to pay the filing fee in three installments. That Order further provided that "**this case shall be dismissed without further notice for failure to comply with this order. No motion to reinstate will be considered.**" (See Order entered October 18, 1994, attached hereto as Exhibit "B"). Ms. Hastings failed to pay the second installment and on December 29, 1994, the Court entered an Order dismissing the case. (See Exhibit "C"). Despite the clear language in the Order entered October 18, 1994, McCubbins prepared a Motion to Reinstate Ms. Hastings' case.

(See Exhibit "D"). At a hearing in the Hastings matter held on January 30, 1995, Ms. Hastings testified that McCubbins charged her $40 to prepare the Motion to Reinstate. (See Transcript of Hearing dated January 30, 1995 at p. 4). Ms. Hastings clearly relied on McCubbins in filing her petition and the erroneously filed Motion to Reinstate.

In the Blakeman case, the U.S. Trustee filed a Motion For Turnover of Excess Funds Pursuant to 11 U.S.C. § 110(h)(2). McCubbins had charged the Blakeman's $195 to prepare their petition. The Court held an evidentiary hearing on this Motion on January 30, 1995, and McCubbins appeared pro se. The Court gave McCubbins every opportunity to defend himself and to put on evidence as to the reasonableness of the fee. McCubbins testified regarding the services he provides to his customers. He stated that he provides them with a questionnaire, and makes available to them the Local Bankruptcy Rules and a book written by Steven Elias, entitled "How To File Bankruptcy" published by Nola Press. He further testified that if they had questions, he would refer them to the book. Upon their completion of the questionnaire, McCubbins said he would type their answers onto the bankruptcy petition forms. (See Transcript of Hearing 1/30/95 at p. 30-33). As to the Blakeman's in particular, McCubbins testified that it was a time-consuming case because Ms. Blakeman brought her five (5) children with her and had to come back on several occasions after gathering information. (Transcript at p. 37-38). McCubbins testified that when she came in, "there'd

be a lengthy session at that point." (Transcript at p.38). The Court questions what they discussed at these "lengthy sessions" and what advice McCubbins offered to Ms. Blakeman.

At the outset, we question the credibility of McCubbins' testimony that he simply provides a book and rules for his customers to read, from which they fill out a questionnaire for his typing of the forms. There are sections of a bankruptcy petition that necessarily involve the knowledge of an attorney in order to be accurately completed. For example, on Schedule C the debtor must list all exemptions he or she intends to claim and the statute allowing the exemption. We have little doubt that the debtors in the four matters at hand failed to possess the requisite knowledge to fill out a petition.

At the hearing on the Blakeman matter, the Court asked McCubbins whether he advised the Blakemans on how to fill out their schedules. McCubbins stated as follows: "Your Honor, before I answer that question may I ask if I would be immune to any prosecution for any unauthorized practice of law if I answer that?" (Transcript at p.47-48). The Court advised McCubbins that the Bankruptcy Court was not able to grant him immunity. The Court questioned McCubbins regarding his answers to customers who had questions about exemptions. McCubbins stated that he gave them a list of the exemptions out of the "How To File Bankruptcy" book and they chose their own exemptions. (See Transcript of Hearing dated January 30, 1995 at p.50-51). The Court is unable to reconcile McCubbins' testimony with the record in this case

and information received by this Court from debtors.

In the Lyvers case, the Debtor filed several Reaffirmation Agreements pro se. The Court set a hearing on the agreements and upon reviewing the file, found the Debtor had listed income of approximately $900 per month and expenses of $1,700. In addition, the Debtor listed no jewelry, no pictures and clothes worth $100. Given the Court's concern over the Lyvers' petition, the Court ordered Ms. Lyvers to amend her schedules to properly list all of her assets. The Court asked Ms. Lyvers how she figured out what to claim as an exemption. Ms. Lyvers answered that McCubbins "told me to write down everything that I've got." (See Transcript of Hearing dated December 12, 1994 at p. 6). She also stated that she did not know the meaning of KRS 427.010, an exemption statute. (Transcript at p.5). Given Ms. Lyvers' answers to the Court's questions, we have little doubt that McCubbins advised Ms. Lyvers regarding her exemptions. After providing McCubbins an opportunity to show cause (which he failed to do), the Court ultimately ordered McCubbins to refund to Ms. Lyvers the $95 which he charged her to improperly prepare her petition, mistakes which could have cost Ms. Lyvers her discharge.

In Reynolds, Hastings and Blakeman, the Court afforded McCubbins another opportunity to appear and show cause why he should not be permanently enjoined from acting as a bankruptcy petition preparer and from engaging in the unauthorized practice of law. On February 21, 1995, McCubbins appeared, pro se, but

offered no proof or other "cause" for the Court to refrain from enjoining him from filing any more papers in this Court.

LEGAL ANALYSIS

1. The Unauthorized Practice of Law

State law is to be considered in determining whether the unauthorized practice of law has occurred. Kentucky Supreme Court Rule 3.020 defines the "practice of law" and states in pertinent part as follows:

> The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor.

A person is guilty of the unlawful practice of law when, without a license issued by the Supreme Court of Kentucky, he or she engages in the practice of law, as defined in SCR 3.020.

An acquired right to practice law vests the holder with a "property right" which he or she may protect against an intruder into the profession who has not likewise acquired such a similar right. Hobson v. Kentucky Trust Co. of Louisville, 197 S.W.2d 454 (Ky. 1946). The practice of law is not to be limited to "the conduct of cases or litigation in court." The practice of law shall also embrace "all advice to clients . . . the preparation

and drafting of all kinds of legal instruments, where the work involves the determination by a trained legal mind of the legal effect of facts and conditions." Id. at 460.

The unsupervised engagement in the practice of law places the rights of the public in jeopardy. Kentucky State Bar Assoc. v. Holland, 411 S.W.2d 674, 675 (Ky. 1967). The Court in Holland noted that reliance on unskilled laymen for advice may gravely effect one's legal rights and responsibilities. Id. Unauthorized persons performing legal activities hinder the proper administration of justice. Id. As one court properly concluded, public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law. Frazee v. Citizens Fidelity Bank & Trust Co., Ky., 393 S.W.2d 778 (Ky. 1965); See, e.g., Kentucky State Bar Assoc. v. Kelly, 421 S.W.2d 829 (Ky. 1967) (court enjoined respondent from engaging in the unauthorized practice of law).

In each of these cases, the rationale for the finding of unauthorized practice of law was the interest of protecting the public from such unauthorized activities by unskilled and untrained individuals.

2. Typing Services and the Unauthorized Practice of Law

The issue of whether certain functions performed by typing services constitute the unauthorized practice of law has been presented to and answered by bankruptcy courts on numerous

occasions. The remedy of injunction to prevent unlicensed persons from practicing law is universally recognized by the courts. See, In re Calzadilla, 151 B.R. 622 (Bankr. S.D. Fla. 1993) (where the court issued an injunction prohibiting preparers from engaging in the unauthorized practice of law and ordered them to disgorge part of their fee).

In the case of In re Bachmann, 113 B.R. 769 (Bankr. S.D.Fla. 1990), Capital Business Services, Inc. provided certain services to individuals who desired to file voluntary petitions for bankruptcy. Mr. Meyer, d/b/a Capital, did more than merely sell and type such forms. He not only selected the bankruptcy chapter for the debtors, but also prepared the debtors' petition. Mr. Meyer was giving advice which required the use of legal judgment requiring legal knowledge, training, skill, and ability beyond that possessed by the average lay person. The Court, in looking to state law, held that Mr. Meyer's activities constituted the unauthorized practice of law. Id. The Court also established guidelines for determining what services may be provided by typing services to possible debtors. They are as follows:

1. Typing services may only copy the written information furnished by the clients.

2. They may not advise clients as to the various remedies and procedures available.

3. They may not make inquiries nor answer questions as to the completion of certain forms nor advise how to best fill out forms or complete schedules.

4. They may sell forms and any printed material purporting to explain bankruptcy practice and procedure to the public.

5. They may not engage in personal legal assistance in conjunction with typing activities, including correcting errors and omissions. Id. at 774.

The Bachmann Court's primary concern was the protection of the public. The Court acknowledged the fact that any limitation on the free practice of law necessarily affects important constitutional rights. A decision to enjoin the activities of any such business affects one's constitutional right to pursue a lawful business and one's First Amendment right to speak and print what one chooses. However, the Court balanced Mr. Meyer's constitutional rights against the public policy of protecting individuals from being advised in legal matters by unqualified persons, and chose to weigh the latter more heavily. Id. at 773. The Bachmann Court stated:

> the Court must balance [the preparer's] rights against the public policy of protecting the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the Code of conduct which, in the public interest, lawyers are bound to observe.

Id. at 773.

In the case of In re Harris, 152 B.R. 440 (Bankr. W.D.Pa. 1993), Mr. Kasuba provided a typing service where he prepared various documents for his customers. In determining whether Mr. Kasuba's services constituted the practice of law, the Court focused upon whether performance of the services required "the exercise of legal judgment." Id. The Court distinguished the mere transcription of written information provided by clients

from making inquiries and answering questions regarding the completion of bankruptcy forms. The Court held that the preparer may not give advice to clients as to how such forms should be filled out and issued an injunction prohibiting the preparer from preparing petitions and schedules. Id. at 445; See also, In re Herren, 138 B.R. 989 (Bankr. D.Wyo. 1992) (where the court found the preparer had engaged in the unauthorized practice of law and required the return of the entire fee to the debtor).

3. The Bankruptcy Reform Act, 11 U.S.C. § 110 (1994), and Local Rule No. 3(3).

The Bankruptcy Reform Act, passed by Congress in October of 1994, contains a new Bankruptcy Code section, 11 U.S.C. § 110, dealing with the various problems associated with bankruptcy petition preparers. Section 110 applies to all cases filed after October 22, 1994, and provides that bankruptcy petition preparers are not authorized to execute documents on behalf of a debtor. Section 110 also provides that preparers are not permitted to receive payment from the debtors for court fees and within ten (10) days after a petition is filed, must file a declaration, under penalty of perjury, disclosing any fee received or charged to the debtor. The Court is authorized to disallow and order the immediate turnover of any fee which the Court finds is in excess of the value of the services for the documents prepared. The debtor may exempt any such funds so recovered. A violation of any of these provisions gives the Court the authority to fine the debtor up to $500. Additionally, 11 U.S.C. § 110 authorizes an

action for damages arising from negligence and for injunctive relief. If the preparer is found liable for damages or is enjoined, the preparer shall be required to pay the debtor, trustee or creditor reasonable attorney fees and costs. Further, the preparer is now required to set forth his name, address and social security number on the petition and is required to sign the petition and furnish a copy to the debtor.

The Local Rules in this District also preclude the unauthorized practice of law. See L.R. 3(3). Local Rule 3 provides:

> The "practice of law" includes, but is not limited to, preparing and filing papers, such as complaints, petitions, applications and motions, questioning witnesses in proceedings before the Bankruptcy Judge and pursuing or defending any action of any nature in this court.

4. McCubbins' Unauthorized Practice of Law.

McCubbins has continually engaged in conduct that interferes with the proper administration of the bankruptcy case, and conduct which constitutes the unauthorized practice of law. McCubbins filed a motion to dismiss in the very case in which he "helped" prepare the petition. See Reynolds, discussed *supra*. He also prepared and filed a motion to reinstate a case, charging the debtor, Ms. Hastings, an extra $40, in contradiction of the Order entered by this Court regarding the payment of filing fee in installments and resulting in the dismissal of the case. In Lyvers, McCubbins' preparation of the petition nearly cost the debtor her discharge, the schedules having been improperly

completed. Due to McCubbins' interference with the administration of the Blakeman case, the Debtors, now represented by counsel, are seeking a voluntary dismissal of their case.

We accord little if any weight to McCubbins' testimony regarding the way in which he deals with his customers. We harbor no doubt that McCubbins has answered questions regarding the filling out of petitions and advised debtors regarding exemptions. The performance of such services requires the exercise of legal judgment. See Harris, *supra*. In balancing McCubbins' constitutional rights against the public interest and, particularly, the protection of the rights of debtors in this Court, we unequivocally choose to protect the public from this chaos.

The pleadings filed by McCubbins constitute the unauthorized practice of law and fly in the face of the purpose of Chapter 7 - discharge of scheduled debt. Both the Blakeman and the Reynolds cases were filed after October 22, 1994, and thus 11 U.S.C. § 110 is applicable. The Blakeman's are seeking a dismissal of their case, McCubbins having created a mess which their counsel is unable to eliminate. Pursuant to 11 U.S.C. § 110, the Court shall require McCubbins to refund to the Blakeman's the $195 fee charged for preparation of the petition, the Court finding the fee excessive and an unauthorized charge for practicing law. In the Reynolds case, we shall assess a fine of $500 against McCubbins pursuant to 11 U.S.C. § 110 for improperly filing a pleading (i.e., the Motion to Dismiss) on behalf of the Debtor.

McCubbins shall pay one-half of the $500 fine to Mr. Reynolds and the other one-half to the Clerk of Court.

In all four cases, we find McCubbins in violation of Local Rule 3(3), McCubbins having prepared and filed petitions, motions and other papers constituting the "practice of law." Based on the overwhelming breath of authority discussed above, we hereby permanently enjoin R.L. McCubbins from filing or preparing for filing any papers in the Bankruptcy Court for the Western District of Kentucky, effective immediately upon the entry of this Court's Order and direct the Clerk of Court to refuse to accept any petition or pleading prepared by R.L. McCubbins.

March _____, 1995

DAVID T. STOSBERG
UNITED STATES BANKRUPTCY JUDGE

ENTERED
DIANE S. ROBL, CLERK

March 17, 1995

U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF KENTUCKY